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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL RIFLE ASSOCIATION
OF AMERICA
Petitioner,

v.

HANDGUN CONTROL FEDERATION OF OHIO
AND SUSAN AXELROD
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the unauthorized photocopying of a copyrighted work for a noncommercial use is a "fair use" within the meaning of 17 U.S.C. § 107, as recently interpreted by this Court in Campbell v. Acuff-Rose Music, Inc., ___ U.S. ____, 114 S.Ct. 1164 (1994), where the user presented no evidence of the effect of the use on the potential market for, or value of, the work?

Whether the unauthorized photocopying of a copyrighted work is a "fair use" within the meaning of 17 U.S.C. § 107 if the user portrays the work as his own?

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OPINION BELOW

The opinion of the Court of Appeals (Appendix) is reported at 15 F.3d 559 (6th Cir. 1994).

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1994. On April 29, 1994, Justice Stevens

extended until June 1, 1994, the time in which to file this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

17 U.S.C. § 107.

Limitations on exclusive rights: Fair use.

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

STATEMENT OF THE CASE

On May 5 and June 7, 1989, the National Rifle Association of America (hereinafter "NRA")[1] sent short letters (two pages in May and one page in June) to its members urging opposition to two "gun control" bills pending in the Ohio legislature. Attached to each newsletter was a three-page listing of Ohio state legislators in a unique format devised by NRA utilizing data derived from a number of sources. One page listed the thirty-three members of the Ohio Senate by their district numbers in ascending numerical order, their home cities, and their phone numbers both in their districts and in Columbus. An asterisk was placed before each of the eight members of the Senate Judiciary Committee. The other two pages contained the same information for a list of the ninety-nine members of the Ohio House of Representatives, with asterisks placed before the nineteen members of the House Judiciary and Criminal Justice Committee. Below the list of representatives was one paragraph of text, reading:

> Those 19 State Representatives marked with an asterisk (*) serve on the House Judiciary and Criminal Justice Committee to which H.B. 372/H.B. 483 has been referred. It is extremely

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[1]The NRA is a New York-based non-profit corporation that lobbies officials and educates its members and the public in support of the ownership of firearms by law-abiding citizens.

> important, especially if you are one of their constituents, to contact their office opposing H.B. 372/H.B. 483. Address letters to your State Representative as follows: The Honorable ___; Ohio House of Representatives; State House; Columbus, Ohio 43266-0603.

A similar paragraph on the Senate page explained the asterisks by the senators and urged members to contact them.

On June 14, 1989, the Handgun Control Federation of Ohio and Susan Axelrod (hereinafter "HCF")[2] mailed a ten-page newsletter to about 200 of its members, in support of the same House bill the NRA opposed. The newsletter began with a page briefly explaining the pending bill and urging the writing of letters to several major Ohio newspapers, whose addresses were provided. Pages eight and nine of the newsletter were NRA's uniquely formatted list of Ohio representatives, which HCF admits was photocopied from one of the NRA mailings, which HCF received. The block of text at the bottom of the list was included in the copying, except that a few words, including the word "opposed," were blocked out.

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[2]HCF is a non-profit organization and engages in activities supporting legislation limiting the right of law-abiding citizens to acquire or possess firearms, in opposition to the NRA. Susan Axelrod was, at all relevant times, the executive director of HCF.

On July 27, 1989, the NRA filed for and received copyright protection for its newsletters.[3] The NRA filed the complaint in this action on May 2, 1990, alleging that HCF copied the NRA's compilation of information concerning the members of the Ohio legislature and published it in its newsletter in violation of the NRA's exclusive copyright under the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq.

On September 2, 1992, the district court granted summary judgment to HCF. 15 F.3d at 560.[4] The court held that the NRA's list of the Ohio representatives could not be copyrighted. Moreover, even if the material was copyrightable, the court held, the defense of "fair use" would bar any damage recovery.

The NRA appealed to the U.S. Court of Appeals for the Sixth Circuit, which affirmed, solely on the ground that the use of the copyrighted material was a "fair use" within the meaning of 17 U.S.C. § 107. The court of appeals did not address the question of copyrightablity.[5]

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[3]17 U.S.C. § 412 allows damages for copyright infringement, so long as the registration for the copyright occurs within three months of the publication of a work. NRA timely filed for copyright protection within three months.

[4]The district court subsequently "dismissed the case." 15 F.3d at 561.

[5]"[W]e need not reach the HCF's argument that the NRA document contained so little originality that it could not be

ARGUMENT

I.
The Sixth Circuit misapplied this Court's interpretation of the fourth factor of the "fair use" analysis of 17 U.S.C. § 107

As it did previously in Campbell v. Acuff-Rose Music, Inc., 972 F.2d 1429 (6th Cir. 1992), rev'd, ___ U.S. ___, 114 S.Ct. 1164 (1994), the Sixth Circuit in the instant case erroneously applied this Court's interpretation, in Sony Corp. of America v. Universal City Studios, Inc., 104 S.Ct. 774 (1984), of the fourth factor of the "fair use" analysis in determining that HCF's use of NRA's copyrighted list was a "fair use" within the meaning of 17 U.S.C. § 107. While the Sixth Circuit's consistency may be laudatory, its error is not.

The Sixth Circuit's decision in the instant case was issued February 1, 1994, just five weeks before this Court's decision in Campbell, in which this Court reversed the judgment of the Sixth Circuit, holding that the Sixth Circuit's "presumption about the effect of commercial use" was "error." 114 S.Ct. at 1177. In the instant case, the same error was duplicated by the Sixth Circuit since it acted without the benefit of this Court's decision in Campbell.

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copyrighted in the first place." 15 F.3d at 562.

In the instant case, the Sixth Circuit viewed Sony as holding that

> whether an activity is commercial sets a presumption regarding which way the fourth factor points in a fair use analysis . . . . (emphasis added) 15 F.3d at 561.

Consequently, the Sixth Circuit reasoned, a court must only try "to see how the use could harm the NRA's market." 15 F.3d at 562. And, not being able to imagine how that could be seen -- indeed, conjuring up a fanciful argument that NRA's "market" would actually be benefitted by HCF's pirating of NRA's materials[6] -- the Sixth Circuit let the presumption decide the question of which way the forth factor "point[ed]."

Both in finding a presumption in § 107 (as construed by Sony) which could point either way and in overlooking the need for HCF to offer evidence to support a "fair use" defense, the Sixth Circuit -- as it did in Campbell -- misapplied § 107.

A) In reversing the Sixth Circuit's decision in Campbell, this Court, in articulating the "error," 114 S.Ct. at 1177, committed by the Sixth Circuit, described how its earlier decision Sony should have been read by the

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[6]"There is presumably more need for the NRA's list if their opponents' activities become more vigorous." 15 F.3d at 562.

Sixth Circuit:

> No "presumption" or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes. Sony's discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the noncommercial context of Sony itself (home copying of television programming). (Emphasis added). 114 S.Ct. at 1177.

As with Campbell, the instant case does not involve "mere duplication for commercial purposes," as the Sixth Circuit itself recognized: "HCF's use of the NRA legislator list was noncommercial." 15 F.3d at 562. Thus, in view of this Court's holding in Campbell, there was no basis for any presumption in analyzing the fourth factor, as the Sixth Circuit concluded in holding that "whether an activity is commercial sets a presumption regarding which way the fourth factor points . . . ." 15 F.3d at 561. Rather, the court of appeals should have, according to Campbell, examined the record for evidence supporting "fair use."

B) There being no presumption, either in favor of the copyright holder or the user in a noncommercial use of a copyrighted work, the user must "carry[] the burden of demonstrating fair use," Campbell, 114 S.Ct. at 1177,

given that "fair use is an affirmative defense . . . . " Id.

In the instant case, by contrast, the Sixth Circuit, consistent with its earlier decision in Campbell, did not recognize "fair use" as an affirmative defense.[7] Moreover, it did not look for evidence in the record supporting "fair use" but rather, having found a presumption in the law, did not even see the need to look for such evidence.[8] Of course, the Sixth Circuit would have found no such evidence since, as with the defendant in Campbell, HCF "failed to address the effect on the market," 114 S.Ct. at 1177, of its use of NRA's copyrighted work.[9] Indeed, the instant case is devoid of any record evidence concerning the effect on NRA's market or on the value of the work and accordingly suffers from the same "silent record on an important

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[7]The Sixth Circuit thus seemingly accepted respondents' argument that the plaintiff had the burden of proving that the defendants' use was harmful.

[8]As noted, supra, the Sixth Circuit not only abjured the need to base its conclusion on record evidence, it conjured up, out of thin air, a bizarre argument that NRA actually benefitted by the piracy of its work. In fact, the evidence would show that NRA was harmed since the value of its list was diminished by HCF's use of it due to the fact that HCF could then more effectively counter NRA's legislative efforts.

[9]The Sixth Circuit also did not address the alternative standard established by the fourth factor: "the effect of the use upon the . . . value of the copyrighted work." 17 U.S.C. § 107.

factor bearing on fair use." 114 S.Ct. at 1179.[10] Because "no such evidentiary presumption is available to address . . . the fourth [factor], market harm," 114 S.Ct. at 1179, as with Campbell, this case, at a minimum, needs to be remanded to allow the "evidentiary hole [to] be plugged . . . ." 114 S.Ct. at 1179.[11]

II.

The Sixth Circuit's decision conflicts with decisions of the Second and Fifth Circuits regarding application of the "fair use" defense under 17 U.S.C. § 107.

A) In Weissman v. Freeman, 868 F.2d 1313 (2nd Cir. 1989), in reviewing application of the "fair use" doctrine, the Second Circuit noted that

> it cannot be ignored that [the copier] not only neglected to credit [the author] for her authorship

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[10]The issue of what is NRA's "market" was, of course, not addressed by the district court or the court of appeals, due to their erroneous understanding of the fourth factor. This question need not be resolved by this Court since it is part and parcel of the evidence that respondents should have offered in the district court.

[11]While the Sixth Circuit did not expressly analyze the first factor, it stated that the HCF newsletter, taken as whole, "served an educational purpose. . . ." 15 F.3d at 562. In holding, as a consequence, that HCF's use was thus "fair," the Sixth Circuit again acted contrary to this Court's decision in Campbell, which held that "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement. . . ." 114 S.Ct. at 1174.

> of P-1, but actually attempted to pass off the work as his own, substituting his name as author in place of hers. Adding insult to this injury, he then distributed copies of her work, but modified the title slightly to one of his own devising. . . . [The copier's] conduct severely undermines his right to claim the equitable defense of fair use. 868 F. 2d at 1324.

Importantly, the Second Circuit went on to observe that it had found no case that sustained the "fair use" defense "under circumstances where copying involved total deletion of the original author's name and substitution of the copier's." Id.

In Triangle Publications, Inc. v. Knight-Ridder Newspaper, Inc. , 626 F.2d 1171 (5th Cir. 1980), the Fifth Circuit approved application of the "fair use" defense, but only after noting that "there was no attempt to palm off Triangle's product as that of the Herald's." (emphasis added). 626 F.2d at 1176. Similarly, in the case that Triangle Publications, Inc. cited for comparison, Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc., 105 F. Supp. 325 (S.D.N.Y. 1952), the court rejected the "fair use" defense even though the defendants "were not attempting to advance [the copyrighted material] as the product of their own genius and effort . . . ." 105 F. Supp. at 333.

Contrary to these decisions -- that advancing

copyrighted material as the reproducer's own material should, without more, ensure rejection of the "fair use" defense -- the Sixth Circuit in the instant case approved precisely what the Second and Fifth Circuits have condemned; it found a "fair use" even though HCF had "passed off" or "palmed off" NRA's list (and most of the accompanying text) as the product as their own efforts. This is a conflict which this Court should resolve.

B) An examination of the application of the second factor of the "fair use" analysis by the Second Circuit in Weissman, supra, also points up a conflict with the Sixth Circuit.

The second factor concerns the nature of the work. While the work as issue in the instant case was "almost entirely factual," 15 F.3d at 562, this does not insulate an unauthorized use from a copyright action under the rubric of the "fair use" defense. Just as protection of the scientific work in Weissman, supra, "may not be directly related to immediate financial gain" but provides "an incentive to continue research," 868 F.2d at 1325, copyright protection of NRA's list and text enable NRA to succeed in the legislative arena and thus to attract greater support, including financial, from its members and the general public. The Sixth Circuit has thus taken a position in conflict with the Second Circuit which this Court should resolve.

CONCLUSION

This Court should grant this petition to review the judgment of the Sixth Circuit in view of the Sixth Circuit's conflict with this Court's decision in Campbell and with decisions of the Second and Fifth Circuits. Alternatively, this Court should grant this petition, vacate the judgment of the Sixth Circuit, and remand for further consideration in light of this Court's decision in Campbell.[12]

Dated: May 1994

Respectfully submitted,

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[12]This Court has followed this course on many occasions in circumstances similar to the instant case. See, e.g., United States v. Sharpe, 457 U.S. 1127 (1982), John Nuveen & Co., Inc. v. Sanders, 425 U.S. 929 (1976), and Wallace v. House, 425 U.S. 947 (1976).

APPENDIX

NO. 92-4076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Plaintiff-Appellant,

v

ON APPEAL from the United States District Court for the Northern District of Ohio

HANDGUN CONTROL FEDERATION OF OHIO, *et al.*,
Defendants-Appellees.

Decided and Filed February 1, 1994

Before: MERRITT, Chief Judge; JONES, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

NATHANIEL R. JONES, Circuit Judge. The National Rifle Association of America ("NRA") appeals from the summary judgment that the district court granted for the Handgun Control Federation of Ohio ("HCF") in this copyright infringement action. The district court ruled that the NRA could not copyright the three-page list of Ohio legislators at issue here. We affirm, holding that HCF has made "fair use" of the list under the copyright statutes and therefore cannot be held liable.

APPENDIX - 2

I.

The NRA is a New York-based non-profit corporation that lobbies officials and educates the public in support of the ownership of firearms. HCF is also a non-profit organization and engages in similar activities, but toward a goal opposing that of the NRA.

On May 5 and June 7, 1989, the NRA sent short letters (two pages in May and one page in June) to its members urging opposition to two gun control bills pending before the Ohio legislature that provided for the ban of certain assault rifles and for waiting periods before gun purchases. Attached to each newsletter was a three-page listing of Ohio state legislators. One page lists the thirty-three members of the Ohio Senate along with their district numbers, their home cities, and their phone numbers both in their districts and in Columbus. An asterisk was placed before each of the eight members of the Senate Judiciary Committee. The other two pages contain the same information for a list of the ninety-nine members of the Ohio House of Representatives, with asterisks placed before the nineteen members of the House Judiciary and Criminal Justice Committee. Below the list of representatives was one paragraph of text, reading:

> Those 19 State Representatives marked with an asterisk (*) serve on the House Judiciary and Criminal Justice Committee to which H.B. 372/H.B. 483 has been referred. It is extremely important, especially if you are one of their constituents, to contact their office opposing H.B. 372/H.B. 483. Address letters to your State Representative as follows: The

Honorable ___; Ohio House of Representatives;
State House; Columbus, Ohio 43266-0603.

J.A. at 280. A similar paragraph on the senate page explained the asterisks by the senators and urged members to contact them.

On June 14, 1989, HCF mailed a ten-page newsletter to about 200 of its members, attempting to arouse support for the same House bill the NRA opposed. The newsletter began with a page briefly explaining the pending bill and urging the writing of letters to several major Ohio newspapers, whose addresses were provided. Seven other pages provided detailed information about types of guns, the effect of gun control legislation, and other states' related gun laws. Pages eight and nine of the newsletter contain a two-page list of Ohio representatives, which HCF admits was photocopied from one of the NRA mailings, which HCF received. The block of text at the bottom of the list was copied, except that a few words, including the word "opposed," were blocked out.

On July 27, 1989, the NRA filed for and received copyright protection for their earlier newsletters.[1] The NRA filed the complaint in this action on May 2, 1990, alleging that HCF copied the NRA's compilation of information concerning the members of the Ohio legislature and published it in its newsletter in violation of the NRA's exclusive copyright under the Copyright Act of 1976, 17 U.S.C. §§ 101-810.

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[1]We note that 17 U.S.C. §412 allows damages to be received for copyright infringement, so long as the registration for the copyright occurs within three months of the publication of a work. Because the NRA registered within this period, it is not blocked from receiving damages by the fact that it did not file for the copyright until after HCF sent out its newsletter

On September 2, 1992, the district court granted summary judgment to the defendant. The court held that the NRA's list of the Ohio representatives could not be copyrighted because the selection and arrangement of the information was "mechanical and routine." J.A. at 16. Even if the material was copyrightable, the court held, the defense of "fair use" would bar any damage recovery. *Id.* Therefore, the court saw no reason to go to trial and dismissed the case. The NRA now appeals.

We review a grant of summary judgment *de novo*. *Rector* v. *General Motors Corp.*, 963 F.2d 144, 146 (6th Cir. 1992). The question on review of a summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 251-52 (1986). Inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

II.

Copyrights provide an incentive for the creation of works by protecting the owner's use of his or her intellectual creation, allowing creators to reap the material rewards of their efforts. However, because not every use of a work undermines this underlying rational of copyright law, and because some uses of copyrighted works are desirable for policy reasons, the courts have long held that many uses of a copyrighted work do not infringe upon the copyright. Codifying these longstanding

"fair use" principles, Congress in the 1976 Copyright Act laid out 17 U.S.C. §107, which reads:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The four factors enumerated are especially relevant to the determination of whether fair use occurred, but they are not meant to exhaust the possible considerations. *Harper & Row Publishers* v. *Nation Enter.*, 471 U.S. 539, 560 (1985). Likewise, the purposes listed in the preamble are illustrations of the sorts of uses likely to qualify as fair uses rather than an exclusive list. *Pacific and Southern Co.* v. *Duncan*, 744 F.2d

1490, 1494-95 (11th Cir. 1984), *cert denied*, 471 U.S. 1004 (1985).

We have no hesitation in finding a fair use here, for all the factors point in that direction. Though not conclusive, the fourth factor -- dealing with effect on market share -- is "the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. This factor is generally demonstrated by a showing that the purpose or character of the use was commercial. In *Sony Corp.* v. *Universal City Studios*, 464 U.S. 417, 451 (1984), the Court explained that whether an activity is commercial sets a presumption regarding which way the fourth factor points in a fair use analysis:

> [A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. . . . What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of further harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

HCF's use of the NRA legislator list was noncommercial. HCF, a non-profit organization, made no attempt to sell the list, which in any event contains information

so readily available that it is doubtful it could be profitably sold. HCF used the list only to further its own lobbying goals. It is also difficult to see how the use could harm the NRA's "market." HCF only sent the information to about 200 members, which could not be a particularly damaging distribution. HCF's use of the list, if it did anything, helped *create* a market for the NRA, as citizens on one side of a controversial issue presumably feel more need to engage in political activity if citizens on the other side of the issue are active. This, in fact, is the apparent reason why the NRA sent out its newsletter in the first place, which began: "URGENT! CALL TO ACTION! Anti-gunners in the Ohio General Assembly have launched an all-out attack on your right to keep and bear arms." J.A. at 276. There presumably is more need for the NRA's list if their opponents' activities become more vigorous.

The publication here may be compared with the publication of an original list of information by one of two competing magazines. In such a case, the copying and publication of the list by the competitor would be presumptively unfair and an infringement, for it would reduce the market for the copyright-holding magazine. This contrast with commercial activity helps show that the purpose and character of HCF's use is far removed from that which the copyright law centrally protects and instead falls within the realm of the designated fair use purposes. The document was used primarily in exercising HCF's First Amendment speech rights to comment on public issues and to petition the government regarding legislation. The scope of the fair use doctrine is wider when the use relates to issues of public concern. *Consumers Union of U.S., Inc.* v. *Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983); *cert. denied*, 469 U.S. 823 (1984). Taken as a whole, the HCF newsletter also served an educational purpose, given the considerable information

contained within the mailing regarding guns and gun legislation. Also, there is no evidence of bad faith on the part of the HCF person who compiled the mailing. (*Cf. Fisher* v. *Dees*, 794 F.2d 432, 436-37 (9th Cir. 1986) (no bad faith which could preclude application of the fair use doctrine).

The other factors also support the conclusion that this was a fair use, particularly the second factor, the nature of the copyrighted work. The list in the NRA newsletter is almost entirely factual, and "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row*, 471 U.S. at 563. As HCF amply shows us, lists containing similar facts are readily available. *See* J.A. at 285-329. Regarding the third factor, although HCF used the entire House of Representatives address list, it did not use the remainder of the copyrighted newsletter, which included a Senate list and a letter to NRA members regarding the pending legislation. This letter contained most of the "originality" in the document. For purposes of the second and third factors, one might contrast the list with the HCF's seven pages of detailed analysis of gun legislation, gun types, and related legislation from other states. Mainly in question-and-answer form, those pages provide many facts and opinions in a fairly creative manner. Assuming these pages were copyrighted, if they were photocopied by someone else, their nature and substantiality would weigh on the side of an infringement rather than on a fair use.

III.

For the above reasons, we hold that HCF made fair use of the NRA legislator list under 17 U.S.C. § 107. Because we so hold, we need not reach the HCF's argument that the NRA document contained so little originality that it could not be

copyrighted in the first place.[2] The grant of summary judgment in favor of the defendant is therefore **AFFIRMED**.

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[2]While facts cannot be copyrighted, original compilations of facts may be. The parties dispute whether the NRA's document contained enough originality to be copyrightable under *Feist Publications, Inc.* v. *Rural Tel. Serv. Co.*, 111 S.Ct. 1282 (1991). *Feist* held that a "white pages" phone directory was not original enough to be copyrighted because it was "so mechanical or routine as to require no creativity whatsoever." *Id.* at 1296.